UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

D&R COMMUNICATIONS, LLC, Plaintiff, v. JOHN GARETT AND GARETT GROUP, INC., Defendants.	CIVIL ACTION NO. 3:11-cv-00413-GEB -DEA

PLAINTIFF D&R'S BRIEF IN (a) SUPPORT OF D&R'S CROSS-MOTION TO AMEND COMPLAINT AND (b) OPPOSITION TO DEFENDANT'S MOTIONS TO DISMISS ORIGINAL COMPLAINT PURSUANT TO F. R. CIV. P. 12(b)(6) and 12(b)(1)

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INTRODUCTION

Plaintiff D&R Communications, LLC (hereinafter "D&R") submits this memorandum (a) in support of its Cross-Motion to Amend its Complaint and (b) in opposition to Defendant Garett Group's Motions to Dismiss Counts I-X in the original Complaint pursuant to Federal Rules of Civil Procedure 12(b)(6) and 12(b)(1). In the interests of judicial economy, D&R has amended its original complaint, as reflected in the amended complaint submitted herewith as Exhibit A, to address Defendant's unfounded concerns about D&R's causes of action so that this litigation can promptly proceed without further delay. D&R adamantly maintains its position that its original Complaint is not deficient and that it sets forth valid causes of action. However, assuming *arguendo* that it does not, certainly each count in D&R's Amended Complaint satisfies the pleading requirements of each respective cause of action. Accordingly, Defendant's Motions to Dismiss should be denied in their entirety, and D&R's Motion to Amend its Complaint should be granted.

LEGAL ARGUMENT

I. THE COURT SHOULD GRANT D&R LEAVE TO AMEND ITS COMPLAINT BECAUSE (a) D&R HAS NOT UNDULY DELAYED IN SEEKING TO AMEND; AND (b) THE AMENDMENT IS SOUGHT IN GOOD FAITH, WITH A MERITORIOUS BASIS FOR THE CLAIMS, AND WOULD NOT RESULT IN ANY, MUCH LESS UNDUE, PREJUDICE TO DEFENDANTS.

F.R.Civ.P. 15(a) (2) addresses amendments after a responsive motion has been filed, and thus governs D&R's motion to amend its Complaint. That Rule requires that courts "freely give leave when justice so requires." Id. The Third Circuit has adopted a "particularly liberal approach" to pleading amendments. United States v. Margolis, 2009 WL 2255336, at *1 (D.N.J. Jul. 28, 2009); see also Bechtel v. Robinson, 886 F.2d 644, 652 (3d Cir. 1989) ("[C]ourts have shown a strong liberality in allowing amendments under Rule 15(a).") (internal punctuation omitted). Consistent with that approach, leave to amend may be denied only where a court finds:

(1) undue delay; (b) bad faith or dilatory motive; (3) undue prejudice to the non-moving party; or (4) futility of amendment. See Alvin v. Suzuki, 227 F.3d 107, 121 (3d Cir. 2000).

Because D&R's proposed amendment suffers from none of the above-listed deficiencies, the Court should grant D&R leave to amend. Amendment in this case would not cause any, much less undue, prejudice. D&R seeks only to amend its Complaint to save judicial resources from having to deal with Defendants' motions to dismiss for failure to state a claim upon which relief can be granted. Certainly there can be no undue prejudice where D&R seeks to redress an issue Defendants themselves raised, and discovery has not yet commenced (because Defendants filed their motions).

D&R is filing this Motion to Amend the Complaint shortly after receiving Defendants' motions to dismiss and prior to the return date of Defendants' motions. Under these circumstances, there has been no undue delay. Nor would an unwarranted burden be placed on the Court as discovery has not yet begun. See UMG Manuf. & Logistics v. I Heller Contr. Co., 2008 WL 5210661, at *3 (D.N.J. Dec. 11, 2008) (no unwarranted burden on court where parties likely could complete any additional discovery needed within time remaining under current schedule).

D&R's actions demonstrate that it has acted at all times to bring this matter to a close through early settlement of the parties' disputes. When the April, 2011 mediation failed to accomplish that goal, D&R promptly brought this cross-motion to amend its Complaint. For these reasons, the Court should find that D&R seeks this amendment in good faith and without dilatory motive.

Finally, D&R's amendments are anything but futile. As D&R firmly believes the original Complaint properly stated causes of action, there are no newly asserted claims in the

Amended Complaint, only changes to address Defendant's concerns set forth in their motions to dismiss. As set forth at length in both Complaints, Defendants have breached their obligations to D&R under the settlement agreement, and each of D&R's causes of action are sufficiently well-grounded in fact. Therefore, the Court should find that D&R's proposed Amended Complaint is not futile.

II. D&R'S AMENDED COMPLAINT PLEADS ALL REQUIRED ELEMENTS OF THE PATENT LAW CAUSES OF ACTION ASSERTED IN COUNTS I, II, AND III AND A REAL AND SUBSTANTIAL ARTICLE III CASE AND CONTROVERSY EXISTS BETWEEN THE PARTIES.

A. Relevant Facts.

Since October 2009, when D&R was forced to terminate its Consulting Agreement with Defendants because of Defendants' nonperformance and breaches, Defendants have engaged in a pattern of malicious and contentious behavior designed to aggravate and damage the business, reputation and goodwill of D&R. Among other activities, in late 2009 prior to the issuance of any patent, D&R became aware that, on information and belief, Defendant Garett was contacting D&R clients and potential clients and falsely asserting that he or Garett Group held exclusive patent rights in and to any patient starter kits, and falsely representing that if a client purchased patient starter kits from any other entity, the client would be infringing a patent. Amended Complaint at ¶ 19. Wanting to avoid protracted litigation but needing to safeguard its business reputation, D&R attempted first to resolve this issue quietly and informally, by requesting that Defendants cease these activities. Amended Complaint at Ex. D.

Defendants' behaviors continued.[1] In yet another attempt to resolve all issues with Garett, D&R negotiated with Defendants and entered into a formal Settlement Agreement, effective February 21, 2010. Id. at Ex. E. The purpose of the Settlement Agreement was to permit the "the parties to engage in legitimate, fair and honest competition in the marketplace, free of interference from the other party." Id. at Ex. E. In the Settlement Agreement, Defendants explicitly agreed that D&R remained free to continue its business of using and marketing D&R Kits, other non-infringing patient starter kits, and similar materials. Id. at Ex. E, ¶ 1.3 of the Settlement Agreement. Defendants further agreed not to assert any proprietary or exclusive rights in any patient starter kit that D&R is permitted to use or make under the terms of this Agreement and which will not be covered by any patent claim that may issue to Garett. Id. at Ex. E, ¶2.2.

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[1] In the U.S., patent applications do not confer any rights on the application owner. Others are free to practice all technology disclosed and claimed in the patent application with impunity, until an actual patent grant is issued by

Despite entering into this formal Settlement Agreement, Defendants continued their behavior. In January 2011, Defendants published letters to at least two of D&R's most important clients, Alcon and DUSA, asserting the Garett Patent against the D&R Kits sold to end consumers by D&R's clients and thereby contending that D&R and its clients infringed the claims of the Garett Patent and additionally violated Defendants' other intellectual property rights. Id. at Ex. G. (hereinafter collectively referred to as "Disparaging Letters").

Counts I, II, and III of the Amended Complaint seek a declaratory judgment that D&R is not infringing the claims of the granted patent and that the Garett Patent is not valid and is not enforceable. Counts I, II, and III plead an actual case or controversy justicible under Article III between the parties with respect to the patient starter kits made and sold by D&R. A Declaratory Judgment is appropriate and necessary to assure D&R's right to compete legitimately in the marketplace.

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the United States Patent and Trademark Office. See 5-16 Donald S. Chisum, Chisum on Patents § 16.04(3) (2011). ("A patent is effective only on issuance by the Patent and Trademark Office.")

B. Defendants' Motion Improperly Argues the "Apprehension of Suit" Standard, Which Has Been Soundly Rejected By the Supreme Court and the Court of Appeals for the Federal Circuit -- The Proper Standard Requires Only the Presence of a Substantial and Sufficiently Immediate and Real Controversy When All Circumstances Are Considered.

The Declaratory Judgment Act provides that "[i]n a case of actual controversy within its jurisdiction . . . any court of the United States, upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought." 28 U.S.C. § 2201(a). The phrase "case of actual controversy" "refers to the type of 'Cases' and 'Controversies' that are justicible under Article III." MedImmune, Inc. v. Genentech, Inc., 549 U.S. 118, 127 (2007).

No bright line rule has been articulated to distinguish those cases that satisfy the actual controversy requirement from those that do not. Indeed, the Supreme Court has pointed out that "[t]he difference between an abstract question and a 'controversy' contemplated by the Declaratory Judgment Act is necessarily one of degree, and it would be difficult, if it even would be possible, to fashion a precise test for determining in every case whether there is such a controversy." Maryland. Cas. Co. v. Pac. Coal & Oil Co., 312 U.S. 270, 273 (1941).

Under current law, it is clear that a declaratory judgment plaintiff does not need to establish a reasonable apprehension of a lawsuit in order to establish that there is an actual controversy between the parties. MedImmune, 549 U.S. 127; SanDisk Corp. v STMicroElectrics, Inc., 480 F. 3d 1372, 1380-81 (Fed. Cir. 2007) ("MedImmune represents [the Supreme Court's] rejection of our reasonable apprehension of suit test"); Teva Pharm. USA, Inc. v. Novartis Pharm. Corp., 482 F. 3d 1330, 1339 (Fed. Cir. 2007). A declaratory judgment plaintiff need only show that the facts alleged, under all the circumstances, show that there is a substantial controversy, between parties having adverse legal interests, of sufficient immediacy and reality, to warrant the issuance of a declaratory judgment. MedImmune, 549 U.S. at 771 (citations omitted). No outright, explicit threat of a law suit by a defendant is necessary. Id.

Indeed, following the Supreme Court's guidance, the Federal Circuit has articulated a framework for subject matter jurisdiction in declaratory judgment patent cases, allowing for a pragmatic assessment of the substantiality, immediacy and reality of the controversy when all the circumstances are considered:

> [W]here a patentee asserts rights under a patent based on certain identified ongoing or planned activity of another party, and where that party contends it has the right to engage in the accused activity without a license, an Article III case or controversy 'will arise and the party need not risk a suit for infringement by engaging in the identified activity before seeking a declaration of its legal rights.

SanDisk, 480 F.3d. at 1381. Subsequent cases have affirmed this standard. See, e.g., Micron Tech, Inc v. Mosaid Techs, Inc, 518 F. 3d 897, 902 (Fed. Cir. 2008) ("[T]he now more lenient legal standard facilitates or enhances the availability of declaratory judgment jurisdiction in patent cases."); Sony Elecs., Inc. v Guardian Media Techs, Ltd, 497 F. 3d 1271, 1286 (Fed. Cir. 2007).

C. An Article III Case and Controversy Existed and Continues to Exist; Therefore Jurisdiction is Proper.

Considered under the proper "total circumstances" test, Defendants' behaviors and actions since at least October 2009 make it clear that a substantial controversy of sufficient immediacy and reality exists between D&R and Defendants such that the issuance of a declaratory judgment is warranted and proper. Defendants have asserted the Garett Patent against real products that D&R and its clients sell in the marketplace and have harmed, and will continue to harm, D&R's and it clients' ability to compete freely. Defendants' Motion to Dismiss Counts I, II and III therefore should be denied.

D&R has pled that, on information and belief, beginning at least as early as October

2009, Defendants' began contacting D&R's clients and potential clients and informing them that D&R and the clients were infringing (the then non-existent) patent rights held by Defendants by virtue of Defendants Garett's patent application for a "patient Starter Kits", constituting the first assertion of the Garett Patent against D&R and its clients that is presently known to D&R. Amended Compl. at ¶19.

Defendants' Disparaging Letters to D&R clients constitute at least a second assertion of Defendants' patent rights against D&R and its clients, including clients to whom D&R has a patent infringement indemnity obligation. In the Disparaging Letters, Defendants:

(1) state with no ambiguity twice that that they believe that the client(s) may have "violate[d] my Intellectual Property for a "Patient Kit" and US Patent No. 7,677,601" and "The [D&R] product and services that may be in violation of my patent.";

(2) present the basis for an assertion that D&R is also infringing the Garett Patent by inducing and or contributing to the clients' direct patent infringement. E.g., Disparaging Letters, stating that D&R supplied to Alcon or DUSA at least two components of the Patient Support Kit covered by the Garett Patent;

(3) charge that the infringement of the Garret Patent is willful on the part of D&R. ("D&R is and was aware of my US Patent for a patient support kit or Patient Kit. . . . D&R received a "close-up" view of my invention and how it works.");

(4) emphasize, twice, that D&R's provision of the Patient Starter Kits is unauthorized by Defendants. Id. ("D&R is not authorized and was never given permission to promote nor granted the use in whole or part of my invention at any time. Currently, Garett Group, Inc. has a legal agreement in place with D&R restricting and preventing them from engaging in promoting,

executing and performing services in exchange for compensation that relate to my patented Patient Kit invention. Their contract with ALCON should reflect this restriction.");

(5) set out a patent infringement analysis of clients' D&R-supplied patient starter kits, explaining what is covered by the Garett Patent relative to the D&R kits. See, Disparaging Letters (stating the Garett Patent covers "a combination of the following: • Consumer supportive coupon(s) (CPG) (provided by D&R); • CPG product sample(s) (provided by D&R); • Pataday [or Levulan] product sample or equivalent; • Pataday [or levulan] patient literature (multiple); • Pataday [or Levulan] discount or co-pay assistance card or equivalent.");

(6) impose a 21 day deadline for response on the clients; and

(7) inform the client that Defendants' patent counsel, Samuel Helfgott, Esq., has received a copy of the letter.

Defendants' contention that the Disparaging Letters constitute mere "requests" for investigation and assert a mere belief that D&R or its clients "may" be infringing rings hollow given the language utilized in the Disparaging Letters. Indeed, controlling law makes clear that declaratory judgment jurisdiction cannot be defeated merely because the patentee has artfully engaged in a "stratagem of a correspondence that avoids the magic words such as "litigation" or "infringement."" Hewlett-Packard Co. v. Acceleron LLC, 587 F. 3d 1358, 1362 (Fed. Cir. 2009). Assertion of patent rights and its logical companion, a threat of a patent infringement litigation, may be implied. Id.; See also, Int'l Dev. Corp v. Simon, 2009 U.S. Dist Lexis 16326 (D.N.J. 2009) (finding declaratory judgment jurisdiction on basis of email from patentee stating merely that plaintiff's product "was of initial concern for patent 7196477" because it caused plaintiff to believe there was an infringement problem).

In Hewlett-Packard, the patentee, by letter correspondence, identified itself to the plaintiff as the owner of a patent that was related to HP's Blade Server product, and imposed two two-week deadlines on HP to respond. Id. at 1360-61. The patentee argued to the court that its letters were merely a permissible attempt to suggest incorporating the patented technology into the other party's product, or to attempt to sell the patent to the other party. Id. The court rejected the patentee's argument finding that, in those situations, the letter correspondence would not have emphasized the relation of the patent to the Blade Server, nor would the patentee have imposed such a short deadline on HP. Id. The court then stated that, under the totality of the circumstances, it was reasonable for HP to interpret the patentee's correspondence as implicitly asserting its rights under the patent. Id. at 1364. Declaratory judgment jurisdiction was held to exist. Id.

Similarly, SanDisk Corp, 480 F. 3d 1372 (Fed. Cir. 2007), the Court of Appeals for the Federal Circuit found that a district court had jurisdiction over a suit requesting a declaration that a patent was invalid and not infringed even though the patentee had never threatened the plaintiff or its clients with an infringement suit. In SanDisk, the patentee was a competitor of the declaratory judgment plaintiff who, prior to the filing of the complaint, provided an infringement analysis to the plaintiff showing the manner in which it believed the plaintiff infringed, liberally referred to the plaintiff's present, ongoing infringement of the patents and the need for the plaintiff to obtain authorization from the patentee (in the form of a license) to continue its course of action. Id. The plaintiff, on the other hand, disagreed with the patentee's analysis and maintained that it did not need a license. Id. The court held that, considering all the circumstances a substantial controversy did exist between the parties such that declaratory judgment jurisdiction existed. Id. at 1383.

Defendants' Disparaging Letters even more aggressively assert the Garett Patent than did the letter correspondence of the Hewlett-Packard patentee or the activities of the SanDisk patentee. Like the patentee in Hewlett-Packard, Defendants have identified the product of Alcon or DUSA that infringes and have imposed a short deadline for response, providing sufficient basis for declaratory judgment jurisdiction. Hewlett-Packard, 587 F. 3d at 1364. Like the patentee in SanDisk, Defendants, in the Disparaging Letters, actually refer to violations of the Garett Patent (twice in the same letter) and they emphasize that D&R patient kits were unauthorized by Defendants, which actions provide sufficient bases for declaratory judgment jurisdiction. SanDisk Corp, 480 F. 3d at 1383.

In addition, Defendants' Disparaging Letters have gone steps further than the individual Hewlett-Packard or SanDisk patentees: The Disparaging Letters present facts that lead to a conclusion that Defendants are asserting that D&R is willfully infringing; and the Disparaging Letters serve to notify the D&R clients that Defendants have engaged patent counsel.

Defendants argue that the law requires an explicit charge of litigation for declaratory judgment jurisdiction to exist, arguing that "unlike the patent owners in Medimmune and the cases since Medimmune," Defendants have never alleged any threat of litigation against D&R or its clients and therefore no case or controversy, and therefore no jurisdiction, can exist. This argument fails as a matter of law. The cases "since MedImmune" are clear; an actual, explicit threat of an infringement suit need not be present for proper jurisdiction under the Act to exist. E.g., SanDisk Corp, 480 F. 3d at 1383; see, also Hewlett-Packard, 587 F. 3d at 1360-64. (finding that declaratory judgment jurisdiction existed even when patentee had never to threatened infringement suit, had never identified specific claims as infringed, had never provided plaintiff with infringement analysis, and had no prior history of litigation or aggressive licensing against other parties, but had merely sent letter correspondence to plaintiff implicitly asserting patent rights.)

Even a promise not to sue the declaratory judgment plaintiff, the polar opposite of a litigation threat, does not bar a finding of jurisdiction over a suit requesting a declaration that a patent is not infringed. Caraco Pharm. Labs., Ltd. v. Forest Labs., Inc., 527 F. 3d 1278, 2182 (Fed. Cir. 2007).

Defendants' argument that absent a track record of litigation or aggressive licensing by Defendants, declaratory judgment jurisdiction is not proper, is similarly deficient. A lack of prior litigations and/or attempts to license the patent does not result in a lack of declaratory judgment jurisdiction. E.g., Hewlett-Packard, 587 F. 3d at 1364 (finding that declaratory judgment jurisdiction existed even when patentee had no prior history of litigation or aggressive licensing against other parties but had merely sent letter correspondence to plaintiff implicitly asserting its patent rights.)

All circumstances considered, Defendants' activities, including their communications, assert the Garett Patent against products provided by D&R and it clients, and give rise to a substantial controversy of immediacy and reality such that Declaratory Judgment jurisdiction is appropriate and necessary .

D. The Controversy Is Substantial and of Sufficient Immediacy and Reality.

The controversy between D&R and Defendants is substantial and is of sufficient immediacy and reality such that the issuance of a declaratory judgment is warranted. It is undisputed that the patient support kits which are alleged to infringe the Garett Patent have at least been made or sold by D&R or its clients. Cat Tech LLC v. Tubemaster, 528 F. 3d 871 (Fed. Cir. 2008) (finding immediate, real and substantial controversy when technology exists in final form and plaintiffs are engaging in present activity that could constitute infringement).

Moreover, Defendants' activities, their Disparaging Letters and their assertions of the Garett Patent against D&R and its clients (whom D&R has indemnified) have resulted in a concrete and real injury to D&R, and not just a purely subjective fear based on the existence of the Garett Patent. Rather, D&R's injuries include the active restraint and/or imminent restraint of free commerce of D&R's non-infringing patient kits, and are directly attributable to Defendants' activities relative to the Garett Patent. See Prasco, LLC v. Medicis Pharm. Corp., 537 F. 3d 1329, 1339 (Fed. Cir. 2008) (Noting that real and concrete injuries-in-fact include "restraint on the free exploitation of non-infringing goods or an imminent threat of such restraint" and that such injuries are "at the root of most justicible declaratory judgment controversies in the patent context.") At a minimum, Defendants' actions have caused exactly this type of injury to D&R by "attempting extrajudicial patent enforcement with scare-the-customer-and-run tactics that infect the competitive environment of the business community with uncertainty and insecurity." Id. citing Arrowhead Indus. Water, Inc. v. Ecolochem, Inc., 846 F. 2d 731, 734-35 (Fed. Cir. 1988).[2]

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[2] Oddly, in Fn. 2 of Defendants' Opening Brief, Defendants imply that D&R has suffered no injury because Defendants' case for patent infringement is weak. The determination of whether an Article III controversy exists does not turn on the substantive merits of the case. Indeed, Defendants' summary of DUSA's response seems to admit that the Letters did assert the Garett Patent and that a controversy does exist.

Because D&R has met its burden of demonstrating that the facts as pled show a substantial and sufficiently immediate and real controversy that is conclusively resolvable by issuance of a Declaratory Judgment, Defendants' Motion to Dismiss Counts I, II and III should be denied.

III. BECAUSE D&R'S AMENDED COMPLAINT PROPERLY PLEADS CAUSES OF ACTION; THE COURT SHOULD GRANT D&R'S MOTION TO AMEND, AND DENY AS MOOT DEFENDANT'S MOTION TO DISMISS COUNTS IV, V, VI, VII, VIII, AND X.

A. D&R's Amended Complaint Pleads All Required Elements of the Cause of Action Asserted in Count IV, Unfair Competition Under Section 43(a) of the Lanham Act.

Assuming *arguendo* that D&R's Lanham Act Unfair Competition count in its original Complaint was in any way deficient, D&R's Amended Complaint properly states a cause of action that is with the scope of the Lanham Act, and thus Defendant's Motion to Dismiss must be denied as moot.

1. The Lanham Act's Prohibitions Against Unfair Competition Include False Or Misleading Statements Concerning Patents and Other Exclusionary Intellectual Property Rights.

Section 43(a) of the Lanham Act provides protection from unfair competitive practices that are grounded in false or misleading commercial speech that relates to the nature, scope, and/or effect of exclusionary intellectual property protections, including patents.

In relevant part, it provides that

> (1) Any person who, on or in connection with any goods or services ... uses in commerce ... any ... false or misleading description of fact, or false or misleading representation of fact, which-
>
> ...
>
> (B) in commercial advertising or promotion, misrepresents the nature, characteristics, qualities, or geographic origin of his or her or another person's goods, services, or commercial activities,

> shall be liable in a civil action by any person who believes that he or she is or is likely to be damaged by such act.

15 U.S.C. § 1125(a)(1). By utilizing such broad language, the Lanham Act "more generally creates a federal cause of action for unfair competition." American Telephone and Telegraph Company v. Winback and Conserve Program, Inc., 42 F. 3d 1421, 1428 (3d Cir. 1994). Courts have interpreted this portion of § 43(a) to provide the bases for what are generally known as "false advertising", "trade libel," and/ or "product disparagement" types of unfair competition claims. 4 J. Thomas McCarthy, McCarthy on Trademarks and Unfair Competition § 27:10, at 27-19 to 27-20 (4th ed.1998). Liability arises under § 43(a)(1)(B) when a defendant makes a commercial statement that is either literally false or ambiguous such that it has the tendency to confuse the recipient. Novartis Consumer Health, Inc. v. Johnson-Merck Consumer Pharmaceuticals Co., 290 F. 3d 578, 586 (3d Cir. 2002).

Courts have found Lanham Act claims of unfair competitive practices to exist when the underlying acts include false representations relating to the scope and/or existence of patent claims, false allegations of patent infringement, and false representations that defendant is the sole legitimate source of a product or service. Zenith Electronics Corp. v. Exzec, Inc., 182 F. 3d 1340 (Fed. Cir. 1999) (Noting that defendant's bad faith allegations of patent infringement and representation to clients as sole legitimate supplier of product were both actionable as unfair competition under § 43(a)); Laser Diode Array, Inc. v. Paradigm Laser, Inc., 964 F. Supp. 90 (W.D.N.Y. 1997) (denying Rule 12(b)(6) motion to dismiss Lanham Act Unfair competition counts based upon defendant's false representations to plaintiffs' clients about the scope of defendants' patent claims); Brandt Consolidated, Inc. v Agrimar Corp., 801 F. Supp. 164

(C.D.Ill. 1992) (granting summary judgment that defendants' letter writing campaign to plaintiff's clients falsely alleging patent infringement violated Section 43(a) of the Lanham Act).

Thus, Defendants' argument that § 43(a) of the Lanham Act is restricted merely to the protection of trademarks, acts of "false advertising" or "false association" is either disingenuous or uninformed. Defendants' contention that its improper activities do not give rise to a Lanham Act cause of action should be disregarded and its motion denied.

2. D&R's Complaint Properly States A Cause of Action Under Section 43(a) of the Lanham Act.

A claim for Unfair Competition under § 43(a)(b)(1) is stated where (i) the defendant made false or misleading statements about the plaintiff's or defendant's own product or service; (ii) there is actual deception or a tendency to deceive the intended audience; (iii) the deception is material in that it is likely to influence purchasing decisions; (iv) the goods/services are offered in interstate commerce; and (v) there is a likelihood of injury to plaintiff. Highmark, Inc., v. UPMC Health Plan, 276 F.3d 160, 171 (3d Cir. 2001).

D&R has pled in detail that defendants in bad faith sent at least two letters to D&R clients that falsely accuse D&R (and its clients) of infringing Defendants' intellectual property and its U.S. Patent No. 7,677,601 and that represent Defendants as the sole legitimate source of the patient support kits. D&R has alleged that such Disparaging Letters were designed to, and did, result in actual deception or a tendency to deceive its clients. Amended Compl. at ¶ 68. It is clear that the deception was material, as it was unambiguously calculated to induce the clients to transfer their "Patient Support Kit" purchases from D&R to Defendants. Id. As alleged in the Amended Complaint, the goods and services were in interstate commerce (*e.g.*, at least Texas, New Jersey, New York and Massachusetts). Id. at ¶ 70, 71. Further, Defendants' anticompetitive practices have injured and continue to injure D&R through at least a loss of goodwill, damage to reputation, and lost sales. Id. at ¶73.

Accordingly, because D&R has alleged each element of a claim for Unfair Competition under § 43(a) of the Lanham Act, Count IV properly pleads a cause of action and should not be dismissed. Rather, Defendant's Motion to Dismiss Count IV should be denied.

B. D&R's Amended Complaint Pleads All Required Elements of the Cause of Action Asserted in Count IX, Unfair Competition under N.J.S.A. § 56:4 and New Jersey Common Law.

Assuming *arguendo* that D&R's Count IX alleging Unfair Competition including Commercial Disparagement in its original Complaint was in any way deficient, D&R's Amended Complaint properly states a cause of action. Thus Defendant's Motion to Dismiss this Count must be denied as moot.

D&R's Amended Complaint properly states causes of action under N.J.S.A. § 56:4 and New Jersey common law Unfair Competition. Claims of Unfair Competition under New Jersey statutory and common law are stated where (i) the defendant made false or misleading statements about the plaintiff's or defendant's own product or service; (ii) there is actual deception or a tendency to deceive the intended audience; (iii) the deception is material in that it is likely to influence purchasing decisions; (iv) the goods/services are offered in commerce; and (v) there is a likelihood of injury to plaintiff. Cancer Genetics v. Hartmayer, 2008 U.S. Dist. LEXIS 8260, at *25-28 (D.N.J. Feb. 4, 2008) (elements of unfair competition claims under § 43 of Lanham Act, New Jersey common law and N.J.S.A. § 56-4 are the same); see also, American Tel. and Tel. Co. v. Winback and Conserve Program, 42 F.3d 1421, 1433 (3d Cir. 1994) ("We previously have held that the 'federal law of unfair competition under § 43(a) is not significantly different from the New Jersey law of unfair competition' and have applied the identical test to both claims.") (Because of the manner in which the courts discuss the identify of the tests, they have not distinguished even the interstate commerce requirement.)

D&R has pled in detail that Defendants in bad faith sent at least two Disparaging Letters to D&R clients that falsely accuse D&R (and its clients) of infringing Defendants' intellectual property and their U.S. Patent No. 7,677,601, and that present Defendants as the sole legitimate source of the patient support kits. Id. at ¶ 19. D&R has alleged that such Disparaging Letters were designed to and did result in actual deception or a tendency to deceive its clients. Id. at ¶ 109. It is clear that the deception was material, as it was unambiguously calculated to induce the clients to transfer their "Patient Support Kit" purchases from D&R to Defendants. Id. As alleged in the Amended Complaint, the goods and services were in interstate commerce (e.g., at least Texas, New Jersey, New York and Massachusetts). Id. at ¶ 112, 113. Further, Defendants' anticompetitive practices have injured and continue to injure D&R through at least the loss of goodwill, damage to reputation, and lost sales. Id. at ¶118.

Accordingly, Count IX states a proper cause of action and should not be dismissed because D&R has alleged each element of claims for Unfair Competition under N.J.S.A. § 56:4 and New Jersey common law, which are essentially the same as a claim under § 43(a) of the Lanham Act. Defendant's Motion to Dismiss this Count should be denied.

C. D&R's Amended Complaint Pleads All Required Elements of the Cause of Action Asserted in Count V, Breach of Contract

Assuming *arguendo* that D&R's Breach of Contract count in its original Complaint was in any way deficient, D&R's Amended Complaint properly states a cause of action and thus Defendant's Motion to Dismiss must be denied as moot. A breach of contract claim is stated by alleging a valid contract, defective performance by the defendant, and resulting damages. Murphy v. Implicito, 392 N.J. Super. 245, 265 (App. Div. 2007); Coyle v. Englander's, 199 N.J.

Super. 212, 223 (App. Div. 1985). Defendants cannot dispute the existence of the referenced valid February 2010 Settlement Agreement. D&R has alleged defaults in Defendants' performance, specifically that they breached §§ 1.3, 2.2 and 3 of the Settlement Agreement. Complaint ¶76. D&R has alleged that it has been damaged by Defendants' conduct, including having to expend legal fees to indemnify and respond to the concerns of its clients who received Disparaging Letters from Defendants. Complaint ¶80. Accordingly, because D&R has satisfied each element of a breach of contract clam, Count V should not be dismissed.

D. D&R's Amended Complaint Pleads All Required Elements of the Cause of Action Asserted in Count VI, Breach of the Covenant of Good Faith and Fair Dealing

Assuming *arguendo* that D&R's Breach of the Covenant of Good Faith and Fair Dealing count in its original Complaint was in any way deficient, D&R's Amended Complaint properly states a cause of action, and thus Defendant's Motion to Dismiss must be denied as moot. "A covenant of good faith and fair dealing is implied in every contract in New Jersey." Sons of Thunder, Inc. v. Borden, Inc., 148 N.J. 396, 420 (1997). The covenant of good faith and fair dealing mandates that a contract party shall not act to destroy or injure the right of the other party to receive the fruits of the contract. Id. Further, "a party must exercise discretion reasonably and with proper motive when that party is vested with the exercise of discretion under a contract." Wilson v. Amerada Hess Corp., 168 N.J. 236, 247 (2001).

Defendants cannot dispute the existence of the Settlement Agreement. D&R has properly alleged that every contract, including the Settlement Agreement, includes an implied covenant of good faith and fair dealing. Complaint ¶83. Specifically, D&R has alleged that Defendants acted with an improper motive to destroy and injure D&R's rights under the Settlement Agreements. Id. at ¶84. Defendants conducted no due diligence or independent investigation to attempt to verify their allegations before they published the Disparaging Letters, never saw the allegedly infringing products, and made no effort to communicate with D&R about the allegations before publishing the Disparaging Letters. Complaint ¶85-86. Defendants breached §§ 1.3, 2.2 and 3 of the Settlement Agreement. Id. at ¶84. D&R alleges that Defendants acted to destroy or injure it with respect to D&R receiving the fruits of the contract. Id. at ¶87. Accordingly, because D&R has satisfied each element of a breach of the covenant of good faith and fair dealing claim, Count VI should not be dismissed.

E. D&R's Amended Complaint Pleads All Required Elements of the Cause of Action Asserted in Count VII, Fraud and Misrepresentation

Assuming *arguendo* that D&R's Fraud/Misrepresentation count in its original Complaint was in any way deficient, D&R's Amended Complaint properly states a cause of action, and thus Defendant's Motion to Dismiss this Count must be denied as moot. In New Jersey, a claim for fraud is stated where (1) there is a material misrepresentation or failure to disclose a material fact; (2) knowledge or belief by the defendant as to the falsity of its representations; (3) an intent that plaintiff rely upon the falsehood or undisclosed fact; (4) reasonable reliance upon the falsehood; and (5) resulting damage. Banco Popular North America v. Gandi, 184 N.J. 161, 172-173 (2005); Gennari v. Weichert Co. Realtors, 148 N.J. 582, 610 (1997).

As to fraud/misrepresentation, D&R has plead with particularity that that there was a material misrepresentation or failure to disclose a material fact: "Defendants concealed material facts pertaining to their intentions not to fulfill their obligations to D&R, including the agreement that the parties would engage in legitimate, fair and honest competition in the marketplace, free of interference from the other party, and/or to instead interfere with D&R's business and otherwise act as aforesaid, including violating sections 1.3, 2.2 and 3 of the Settlement Agreement." Complaint ¶90. D&R has pled that "Defendants intentionally concealed such information" and "Defendants intended for D&R to rely upon them with respect to such representations and concealments." Id. ¶¶92-93. D&R has also pled that it relied on "Defendants in agreeing to the terms of the Settlement Agreement and performing thereunder…". Id. at ¶94. Finally, D&R has pled its resulting damages, namely that it refrained "from pursuing other claims against Defendants, including claims arising under the consulting agreement and related agreements" to its "great and continuing damage." Id. at 94. Accordingly, because D&R has satisfied each element of a fraud/misrepresentation claim, Count VII states a valid cause of action and should not be dismissed.

F. D&R's Amended Complaint Pleads All Required Elements of the Cause of Action Asserted in Count VIII, Interference with Contracts and Existing Prospective Economic Advantages

Assuming *arguendo* that D&R's Interference with Contracts and Existing Prospective Economic Advantages count in its original Complaint was in any way deficient, D&R's Amended Complaint properly states a cause of action and thus Defendant's Motion to Dismiss must be denied as moot. To state a claim for tortious interference with existing contractual relations under New Jersey law, a plaintiff must allege: (1) the existence of a contractual relation between the plaintiff and a third party; (2) purposeful action on the part of the defendant specifically intended to harm that existing relationship; (3) the absence of privilege or justification on the part of the defendant; and (4) actual legal damage to the plaintiff as the result of the defendant's conduct. See Printing Mart-Morristown v. Sharp Electronics Corp., 116 N.J. 739, 751-52 (N.J. 1989). D&R has pled the existence of contractual relationships between it and its third-party clients, as well as the expectancy of such relationships with prospective clients, in the pharmaceutical industry. Complaint ¶98. Defendants were aware of those relationships and expectancies and intentionally, with malice, sent the Disparaging Letters to D&R's clients, whose are also prospective clients with respect to further engagements for other projects, intending to cause harm to D&R. Id. at 1¶99-101. Upon information and belief, Defendants had no privilege or justification for their actions. Id. at ¶100.

D&R alleges that while its damages analysis is ongoing and requires discovery in this matter, its economic advantages have already been diminished by virtue of having to expend legal fees and other resources to fulfill its indemnification agreements to its clients. Id. at 105-106. But for Defendants' interferences with these relationships, D&R would not have been damaged by spending resources to fulfill its indemnification obligations with its clients. Id. at ¶105. Accordingly, because D&R has satisfied each element of an Interference with Contracts and Existing Prospective Economic Advantages claim, Count VII states a valid cause of action and should not be dismissed.

G. D&R's Amended Complaint Pleads All Required Elements of the Cause of Action Asserted in Count X, Defamation

Assuming *arguendo* that D&R's Defamation count in its original Complaint was in any way deficient, D&R's Amended Complaint now properly states a cause of action and thus Defendant's Motion to Dismiss this Count must be denied as moot. To state a claim for defamation, a plaintiff must allege: (1) that defendants made a false and defamatory statement concerning the plaintiff; (2) that the statement was communicated to another person (and not privileged); and (3) that the defendants acted negligently or with actual malice. G.D. v. Kenny, 205 N.J. 275 (2011). D&R has pled a classic case of defamation. D&R has plead in detail that Defendants sent the defamatory Letters to its clients that falsely accuse D&R of providing a patent kit that violates Defendants' intellectual property for a patient kit and US Patent No. 7,677,601. Id. at ¶122-141. D&R alleges that Defendants acted negligently or with actual malice in sending these Letters. Id. Accordingly, because D&R has pled each element of a Defamation claim, Count X states a valid cause of action and should not be dismissed.

CONCLUSION

For the forgoing reasons, Plaintiff D&R Communications, LLC respectfully requests that its Motion to Amend its Complaint be granted and that Defendant's Motions to Dismiss be denied.

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